

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 19, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP496-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2012CF173

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN JAMES GREELEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Steven Greeley appeals a judgment convicting him of possessing methamphetamine and possessing drug paraphernalia, both as a

party to a crime.¹ He also appeals an order denying his postconviction motion in which he requested a new trial in the interest of justice based on three witnesses' testimony that they heard a State's witness, Eric Frisle, say some of the methamphetamine belonged to him. The circuit court found that Greeley knew about these witnesses and Frisle's statement before the trial, and did not tell his trial attorney about them. The court denied the postconviction motion, concluding "That's his error, not a court error," and "he doesn't get a second kick at the cat" On appeal, Greeley asks this court to grant him a new trial in the interest of justice, arguing the controversy was not fully tried because the jury did not hear from the three witnesses. We affirm the judgment and order.

BACKGROUND

¶2 Greeley and Frisle went to a Kwik Trip store and stood together at the checkout counter. After they left, a citizen found a baggie on the floor where they had been standing. He turned the baggie over to the police. It was later determined to contain methamphetamine. The store's video recording, which consists of a series of frames rather than a continual video, shows the baggie appeared on the floor while Greeley and Frisle were at the counter but does not show which of them dropped it.

¶3 Police were able to identify the car they left in and made a traffic stop later that day. The car was titled in Frisle's father's name, and Frisle was driving the car. Greeley, a passenger, gave police a false identification. A search of the car revealed marijuana, a pipe used for smoking marijuana, two baggies

¹ The judgment also convicted Greeley of obstructing an officer, but he does not challenge that conviction.

containing white residue in the console between the seats, hydrocodone and oxycodone pills in a suitcase in the back seat, and a black case containing methamphetamine and paraphernalia for smoking methamphetamine under the passenger seat where Greeley had been sitting.

¶4 In statements to police and at Greeley's trial, Frisle took responsibility for the marijuana, the marijuana pipe and the pills in the suitcase. Frisle was charged with possessing methamphetamine as a party to a crime, possessing hydrocodone, possessing tetrahydrocannabinol (THC) as a party to a crime, and two counts of possessing drug paraphernalia. Pursuant to a plea agreement before Greeley's trial, Frisle was convicted of possessing THC and THC paraphernalia. The other charges were dismissed. Frisle denied any knowledge of the methamphetamine and the pipes found in the black case under the passenger seat or the baggie dropped in the store. He testified he had seen Greeley with the black case at some undisclosed time before the traffic stop.

¶5 Frisle died between the time of Greeley's trial and his postconviction motion. The postconviction motion identified two witnesses, Zachary Sexton and Jason Almsted, who heard Frisle on separate occasions admit to dropping the drugs on the Kwik Trip floor. At the postconviction hearing, a third witness, Bill Clark, testified about another time he heard Frisle say he dropped the methamphetamine baggie at the Kwik Trip.

¶6 Almsted described both Frisle and Greeley as "an acquaintance." He testified that when Frisle told him about dropping the baggie at Kwik Trip, Frisle appeared to be "jittery and paranoid," and his statements were "really hard to follow." Almsted did not inform the authorities about Frisle's admission because he made a "conscious effort to distance [himself] from people in that type of

lifestyle.” Almsted was contacted by a defense investigator after the trial, suggesting that Greeley at some point became aware of Almsted’s conversation with Frisle.

¶7 Zachary Sexton testified at the postconviction hearing that shortly after Greeley and Frisle were arrested, he overheard Frisle bragging to others about dropping a “bag of dope” and not getting charged for it. Sexton told Greeley about the statement the next day. Although Sexton did not inform authorities about the statement because it was “none of [his] business,” he testified he would have come forward earlier if he had been asked.

¶8 Bill Clark testified he heard Frisle say on more than one occasion he dropped the methamphetamine. He also testified he heard Frisle and Greeley talking about the incident shortly after their arrest, and Frisle admitted to Greeley that he dropped the baggie at the Kwik Trip.

DISCUSSION

¶9 Greeley concedes the testimony of his three postconviction witnesses does not meet the test for newly discovered evidence because he was aware of Frisle’s statements before his trial. Rather, he invokes our discretionary authority to grant a new trial in the interest of justice. A new trial in the interest of justice should be granted only if the case presents exceptional circumstances. *See State v. Armstrong*, 2005 WI 119, ¶114 & n.26, 283 Wis. 2d 639, 700 N.W.2d 98.

¶10 This court may order a new trial in the interest of justice when the controversy was not fully tried. *See* WIS. STAT. § 752.35 (2013-14). A controversy is not fully tried “when the jury is erroneously not given the opportunity to hear important testimony on an important issue in the case.” *State*

v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). Greeley focuses on the methamphetamine dropped on the Kwik Trip floor rather than the methamphetamine found in the black case under the passenger seat. He contends Frisle's statements regarding the baggie in the store would affect the jury's assessment of Frisle's credibility regarding the black case. None of the three new witnesses indicated that Frisle took responsibility for the methamphetamine found in the car. The marginal impeachment value of their testimony is not sufficiently important to constitute an exceptional circumstance.

¶11 Furthermore, in this case, the "error" of not informing the jury of Frisle's inculpatory statements regarding the Kwik Trip baggie was attributable to Greeley alone. The interest of justice is not served by allowing a defendant to choose not to present relevant evidence, and then seek to present it when the outcome of the trial is not as he had wished.

¶12 Citing *Garcia v. State*, 73 Wis. 2d 651, 245 N.W.2d 654 (1976), Greeley argues he can request a new trial in the interest of justice even though he chose not to present the testimony of the three witnesses because he had an understandable if misguided motive for not presenting the witnesses at his trial. He specifically notes Almsted's fear of retaliation. However, there was no testimony that Almsted expressed this fear to Greeley before the trial, and no testimony that Sexton or Clark feared retaliation. In fact, Sexton said he would have testified at the trial if he had been asked. As in *State v. McConnohie*, 113 Wis. 2d 362, 373, 334 N.W.2d 903 (1983), no witness testified that Greeley was attempting to protect the three witnesses by not calling them to testify at the trial.

¶13 Finally, a new trial would not cause the controversy to be fully tried because the State would be deprived of a chance for Frisle to explain or refute the

statements overheard by the three new witnesses. The interest of justice requires that Greeley bear the consequences of his decision to withhold evidence at his trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

